

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

PUBLIC ORDER

)	
)	
Grievant,)	
v.)	MERB Docket No. 05-10-341
)	
DEPARTMENT OF HEALTH AND)	DECISION AND ORDER ON
SOCIAL SERVICES,)	MOTION TO DISMISS
)	
Employer.)	

BEFORE Brenda C. Phillips, Chairperson, John F. Schmutz, Esquire, Paul R. Houck, and Joseph D. Dillon, Members, constituting a quorum of the Merit Employee Relations Board ("MERB" or the "Board") pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Appellant: Timothy J. Wilson, Esquire
Margolis & Edelstein
1509 Gilpin Avenue
Wilmington, DE 19806

For the Department: Kevin Slattery, Deputy Attorney General
State Of Delaware
Department of Justice
Carvel State Building
820 N. French Street
Wilmington, DE 19801

ORDER GRANTING MOTION TO DISMISS

WHEREAS, this matter is before the MERB on a Motion to Dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted filed by the

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Department of Health and Social Services (hereinafter "DHSS") on or about March 1, 2006; and

WHEREAS, the Appellant, through counsel, filed a letter response to the Motion to Dismiss on or about March 21, 2006 in which Appellant acknowledged the MERB's lack of jurisdiction over this matter due to the existence of a controlling collective bargaining agreement but submitted that she was not being given her rights under the collective bargaining agreement; and

WHEREAS, the MERB heard oral argument from the parties on April 6, 2006; and

WHEREAS, the Appellant was at the time of her grievance, a Nursing Assistant at the Delaware Psychiatric Center ("DPC") and a member of the employee bargaining unit known as the American Federation of State, County and Municipal Employees ("AFSCME") Council 81, Local 640 for collective bargaining purposes pursuant to 19 Del.C. ch. 13; and

WHEREAS, pursuant to the Collective Bargaining Agreement ("CBA") between the DPC and the AFSCME Council 81, Local 640, the matter being grieved pertains to a disciplinary action and the CBA, therefore, provides that the matter is to be governed by the process outlined in Articles 4 and 8 of the CBA; and

WHEREAS, the grievance pertains to a disciplinary action covered by the CBA, and the proper appeal procedure after the pre-arbitration meeting is to file a demand for arbitration; and

WHEREAS, the Board's power and authority are derived exclusively from the statute, and its power extends only to those cases which are properly before it in compliance with the statutory law. Maxwell v. Vetter, 311 A.2d 864 (1973); and

WHEREAS, the MERB does not have jurisdiction to consider grievances filed by an employee where the subject is covered in whole or in part by a collective bargaining agreement. 29 Del.C. §5938; *see also* Merit Rules 1.3, 18.3; and

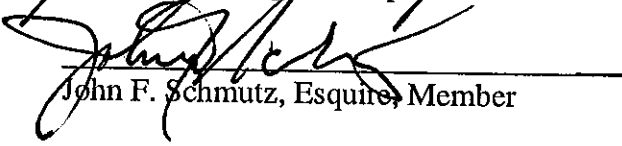
WHEREAS, there exists a valid collective bargaining agreement between the State and the AFSCME Council 81, Local 640, and the grievance procedures available to the grievant are set forth in that agreement; and

WHEREAS, the Board lacks jurisdiction because the grievance is controlled, in whole or in part, by the Agreement. 29 Del.C. §5938(d); Morris v. Department of Correction, 1998 WL 283478 (Del.Super. 1998).

NOW THEREFORE, for the reasons stated herein, the above captioned grievance appeal, is **DISMISSED**.


IT IS SO ORDERED this 28th day of June, 2006.


Brenda C. Phillips, Chairperson


John F. Schmutz, Esquire, Member

Paul R. Houck, Member


Joseph D. Dillon, Member

Mailing Date: 6/29/06 

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Counsel for the Parties

Merit Employee Relations Board